

Republic of the Philippines
SUPREME COURT
Manila

SECOND DIVISION

G.R. No. L-45710 October 3, 1985

CENTRAL BANK OF THE PHILIPPINES and ACTING DIRECTOR ANTONIO T. CASTRO, JR. OF THE DEPARTMENT OF COMMERCIAL AND SAVINGS BANK, in his capacity as statutory receiver of Island Savings Bank, petitioners,

vs.

THE HONORABLE COURT OF APPEALS and SULPICIO M. TOLENTINO, respondents.

I.B. Regalado, Jr., Fabian S. Lombos and Marino E. Eslao for petitioners.

Antonio R. Tupaz for private respondent.

MAKASIAR, CJ.:

This is a petition for review on certiorari to set aside as null and void the decision of the Court of Appeals, in C.A.-G.R. No. 52253-R dated February 11, 1977, modifying the decision dated February 15, 1972 of the Court of First Instance of Agusan, which dismissed the petition of respondent Sulpicio M. Tolentino for injunction, specific performance or rescission, and damages with preliminary injunction.

On April 28, 1965, Island Savings Bank, upon favorable recommendation of its legal department, approved the loan application for P80,000.00 of Sulpicio M. Tolentino, who, as a security for the loan, executed on the same day a real estate mortgage over his 100-hectare land located in Cubo, Las Nieves, Agusan, and covered by TCT No. T-305, and which mortgage was annotated on the said title the next day. The approved loan application called for a lump sum P80,000.00 loan, repayable in semi-annual installments for a period of 3 years, with 12% annual interest. It was required that Sulpicio M. Tolentino shall use the loan proceeds solely as an additional capital to develop his other property into a subdivision.

On May 22, 1965, a mere P17,000.00 partial release of the P80,000.00 loan was made by the Bank; and Sulpicio M. Tolentino and his wife Edita Tolentino signed a promissory note for P17,000.00 at 12% annual interest, payable within 3 years from the date of execution of the contract at semi-annual installments of P3,459.00 (p. 64, rec.). An advance interest for the P80,000.00 loan covering a 6-month period amounting to P4,800.00 was deducted from the partial release of P17,000.00. But this pre-deducted interest was refunded to Sulpicio M. Tolentino on July 23, 1965, after being informed by the Bank that there was no fund yet available for the release of the P63,000.00 balance (p. 47, rec.). The Bank, thru its vice-president and treasurer, promised repeatedly the release of the P63,000.00 balance (p. 113, rec.).

On August 13, 1965, the Monetary Board of the Central Bank, after finding Island Savings Bank was suffering liquidity problems, issued Resolution No. 1049, which provides:

In view of the chronic reserve deficiencies of the Island Savings Bank against its deposit liabilities, the Board, by unanimous vote, decided as follows:

- 1) To prohibit the bank from making new loans and investments [except investments in government securities] excluding extensions or renewals of already approved loans, provided that such extensions or renewals shall be subject to review by the Superintendent of Banks, who may impose such limitations as may be necessary to insure correction of the bank's deficiency as soon as possible;

xxx xxx xxx

(p. 46, rec.).

On June 14, 1968, the Monetary Board, after finding that Island Savings Bank failed to put up the required capital to restore its solvency, issued Resolution No. 967 which prohibited Island Savings Bank from doing business in

the Philippines and instructed the Acting Superintendent of Banks to take charge of the assets of Island Savings Bank (pp. 48-49, rec.).

On August 1, 1968, Island Savings Bank, in view of non-payment of the P17,000.00 covered by the promissory note, filed an application for the extra-judicial foreclosure of the real estate mortgage covering the 100-hectare land of Sulpicio M. Tolentino; and the sheriff scheduled the auction for January 22, 1969.

On January 20, 1969, Sulpicio M. Tolentino filed a petition with the Court of First Instance of Agusan for injunction, specific performance or rescission and damages with preliminary injunction, alleging that since Island Savings Bank failed to deliver the P63,000.00 balance of the P80,000.00 loan, he is entitled to specific performance by ordering Island Savings Bank to deliver the P63,000.00 with interest of 12% per annum from April 28, 1965, and if said balance cannot be delivered, to rescind the real estate mortgage (pp. 32-43, rec.).

On January 21, 1969, the trial court, upon the filing of a P5,000.00 surety bond, issued a temporary restraining order enjoining the Island Savings Bank from continuing with the foreclosure of the mortgage (pp. 86-87, rec.).

On January 29, 1969, the trial court admitted the answer in intervention praying for the dismissal of the petition of Sulpicio M. Tolentino and the setting aside of the restraining order, filed by the Central Bank and by the Acting Superintendent of Banks (pp. 65-76, rec.).

On February 15, 1972, the trial court, after trial on the merits rendered its decision, finding unmeritorious the petition of Sulpicio M. Tolentino, ordering him to pay Island Savings Bank the amount of P1 7 000.00 plus legal interest and legal charges due thereon, and lifting the restraining order so that the sheriff may proceed with the foreclosure (pp. 135-136, rec.).

On February 11, 1977, the Court of Appeals, on appeal by Sulpicio M. Tolentino, modified the Court of First Instance decision by affirming the dismissal of Sulpicio M. Tolentino's petition for specific performance, but it ruled that Island Savings Bank can neither foreclose the real estate mortgage nor collect the P17,000.00 loan pp. 30-31, rec.).

Hence, this instant petition by the central Bank.

The issues are:

1. Can the action of Sulpicio M. Tolentino for specific performance prosper?
2. Is Sulpicio M. Tolentino liable to pay the P17,000.00 debt covered by the promissory note?
3. If Sulpicio M. Tolentino's liability to pay the P17,000.00 subsists, can his real estate mortgage be foreclosed to satisfy said amount?

When Island Savings Bank and Sulpicio M. Tolentino entered into an P80,000.00 loan agreement on April 28, 1965, they undertook reciprocal obligations. In reciprocal obligations, the obligation or promise of each party is the consideration for that of the other (Penaco vs. Ruaya, 110 SCRA 46 [1981]; Vda. de Quirino vs. Pelarca 29 SCRA 1 [1969]); and when one party has performed or is ready and willing to perform his part of the contract, the other party who has not performed or is not ready and willing to perform incurs in delay (Art. 1169 of the Civil Code). The promise of Sulpicio M. Tolentino to pay was the consideration for the obligation of Island Savings Bank to furnish the P80,000.00 loan. When Sulpicio M. Tolentino executed a real estate mortgage on April 28, 1965, he signified his willingness to pay the P80,000.00 loan. From such date, the obligation of Island Savings Bank to furnish the P80,000.00 loan accrued. Thus, the Bank's delay in furnishing the entire loan started on April 28, 1965, and lasted for a period of 3 years or when the Monetary Board of the Central Bank issued Resolution No. 967 on June 14, 1968, which prohibited Island Savings Bank from doing further business. Such prohibition made it legally impossible for Island Savings Bank to furnish the P63,000.00 balance of the P80,000.00 loan. The power of the Monetary Board to take over insolvent banks for the protection of the public is recognized by Section 29 of R.A. No. 265, which took effect on June 15, 1948, the validity of which is not in question.

The Board Resolution No. 1049 issued on August 13, 1965 cannot interrupt the default of Island Savings Bank in complying with its obligation of releasing the P63,000.00 balance because said resolution merely prohibited the Bank from making new loans and investments, and nowhere did it prohibit Island Savings Bank from releasing the balance of loan agreements previously contracted. Besides, the mere pecuniary inability to fulfill an engagement does not discharge the obligation of the contract, nor does it constitute any defense to a decree of specific performance (Gutierrez Repide vs. Afzelius and Afzelius, 39 Phil. 190 [1918]). And, the mere fact of insolvency of a debtor is never an excuse for the non-fulfillment of an obligation but 'instead it is taken as a breach of the contract by him (vol. 17A, 1974 ed., CJS p. 650)

The fact that Sulpicio M. Tolentino demanded and accepted the refund of the pre-deducted interest amounting to P4,800.00 for the supposed P80,000.00 loan covering a 6-month period cannot be taken as a waiver of his right

to collect the P63,000.00 balance. The act of Island Savings Bank, in asking the advance interest for 6 months on the supposed P80,000.00 loan, was improper considering that only P17,000.00 out of the P80,000.00 loan was released. A person cannot be legally charged interest for a non-existing debt. Thus, the receipt by Sulpicio M. Tolentino of the pre-deducted interest was an exercise of his right to it, which right exist independently of his right to demand the completion of the P80,000.00 loan. The exercise of one right does not affect, much less neutralize, the exercise of the other.

The alleged discovery by Island Savings Bank of the over-valuation of the loan collateral cannot exempt it from complying with its reciprocal obligation to furnish the entire P80,000.00 loan. This Court previously ruled that bank officials and employees are expected to exercise caution and prudence in the discharge of their functions (Rural Bank of Caloocan, Inc. vs. C.A., 104 SCRA 151 [1981]). It is the obligation of the bank's officials and employees that before they approve the loan application of their customers, they must investigate the existence and evaluation of the properties being offered as a loan security. The recent rush of events where collaterals for bank loans turn out to be non-existent or grossly over-valued underscore the importance of this responsibility. The mere reliance by bank officials and employees on their customer's representation regarding the loan collateral being offered as loan security is a patent non-performance of this responsibility. If ever bank officials and employees totally rely on the representation of their customers as to the valuation of the loan collateral, the bank shall bear the risk in case the collateral turn out to be over-valued. The representation made by the customer is immaterial to the bank's responsibility to conduct its own investigation. Furthermore, the lower court, on objections of Sulpicio M. Tolentino, had enjoined petitioners from presenting proof on the alleged over-valuation because of their failure to raise the same in their pleadings (pp. 198-199, t.s.n. Sept. 15, 1971). The lower court's action is sanctioned by the Rules of Court, Section 2, Rule 9, which states that "defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived." Petitioners, thus, cannot raise the same issue before the Supreme Court.

Since Island Savings Bank was in default in fulfilling its reciprocal obligation under their loan agreement, Sulpicio M. Tolentino, under Article 1191 of the Civil Code, may choose between specific performance or rescission with damages in either case. But since Island Savings Bank is now prohibited from doing further business by Monetary Board Resolution No. 967, WE cannot grant specific performance in favor of Sulpicio M. Tolentino.

Rescission is the only alternative remedy left. WE rule, however, that rescission is only for the P63,000.00 balance of the P80,000.00 loan, because the bank is in default only insofar as such amount is concerned, as there is no doubt that the bank failed to give the P63,000.00. As far as the partial release of P17,000.00, which Sulpicio M. Tolentino accepted and executed a promissory note to cover it, the bank was deemed to have complied with its reciprocal obligation to furnish a P17,000.00 loan. The promissory note gave rise to Sulpicio M. Tolentino's reciprocal obligation to pay the P17,000.00 loan when it falls due. His failure to pay the overdue amortizations under the promissory note made him a party in default, hence not entitled to rescission (Article 1191 of the Civil Code). If there is a right to rescind the promissory note, it shall belong to the aggrieved party, that is, Island Savings Bank. If Tolentino had not signed a promissory note setting the date for payment of P17,000.00 within 3 years, he would be entitled to ask for rescission of the entire loan because he cannot possibly be in default as there was no date for him to perform his reciprocal obligation to pay.

Since both parties were in default in the performance of their respective reciprocal obligations, that is, Island Savings Bank failed to comply with its obligation to furnish the entire loan and Sulpicio M. Tolentino failed to comply with his obligation to pay his P17,000.00 debt within 3 years as stipulated, they are both liable for damages.

Article 1192 of the Civil Code provides that in case both parties have committed a breach of their reciprocal obligations, the liability of the first infractor shall be equitably tempered by the courts. WE rule that the liability of Island Savings Bank for damages in not furnishing the entire loan is offset by the liability of Sulpicio M. Tolentino for damages, in the form of penalties and surcharges, for not paying his overdue P17,000.00 debt. The liability of Sulpicio M. Tolentino for interest on his P17,000.00 debt shall not be included in offsetting the liabilities of both parties. Since Sulpicio M. Tolentino derived some benefit for his use of the P17,000.00, it is just that he should account for the interest thereon.

WE hold, however, that the real estate mortgage of Sulpicio M. Tolentino cannot be entirely foreclosed to satisfy his P17,000.00 debt.

The consideration of the accessory contract of real estate mortgage is the same as that of the principal contract (Banco de Oro vs. Bayuga, 93 SCRA 443 [1979]). For the debtor, the consideration of his obligation to pay is the existence of a debt. Thus, in the accessory contract of real estate mortgage, the consideration of the debtor in furnishing the mortgage is the existence of a valid, voidable, or unenforceable debt (Art. 2086, in relation to Art. 2052, of the Civil Code).

The fact that when Sulpicio M. Tolentino executed his real estate mortgage, no consideration was then in existence, as there was no debt yet because Island Savings Bank had not made any release on the loan, does not make the real estate mortgage void for lack of consideration. It is not necessary that any consideration should

pass at the time of the execution of the contract of real mortgage (*Bonnevie vs. C.A.*, 125 SCRA 122 [1983]). It may either be a prior or subsequent matter. But when the consideration is subsequent to the mortgage, the mortgage can take effect only when the debt secured by it is created as a binding contract to pay (*Parks vs. Sherman*, Vol. 176 N.W. p. 583, cited in the 8th ed., *Jones on Mortgage*, Vol. 2, pp. 5-6). And, when there is partial failure of consideration, the mortgage becomes unenforceable to the extent of such failure (*Dow. et al. vs. Poore*, Vol. 172 N.E. p. 82, cited in Vol. 59, 1974 ed. CJS, p. 138). Where the indebtedness actually owing to the holder of the mortgage is less than the sum named in the mortgage, the mortgage cannot be enforced for more than the actual sum due (*Metropolitan Life Ins. Co. vs. Peterson*, Vol. 19, F(2d) p. 88, cited in 5th ed., *Wiltzie on Mortgage*, Vol. 1, P. 180).

Since Island Savings Bank failed to furnish the P63,000.00 balance of the P80,000.00 loan, the real estate mortgage of Sulpicio M. Tolentino became unenforceable to such extent. P63,000.00 is 78.75% of P80,000.00, hence the real estate mortgage covering 100 hectares is unenforceable to the extent of 78.75 hectares. The mortgage covering the remainder of 21.25 hectares subsists as a security for the P17,000.00 debt. 21.25 hectares is more than sufficient to secure a P17,000.00 debt.

The rule of indivisibility of a real estate mortgage provided for by Article 2089 of the Civil Code is inapplicable to the facts of this case.

Article 2089 provides:

A pledge or mortgage is indivisible even though the debt may be divided among the successors in interest of the debtor or creditor.

Therefore, the debtor's heirs who has paid a part of the debt can not ask for the proportionate extinguishment of the pledge or mortgage as long as the debt is not completely satisfied.

Neither can the creditor's heir who have received his share of the debt return the pledge or cancel the mortgage, to the prejudice of other heirs who have not been paid.

The rule of indivisibility of the mortgage as outlined by Article 2089 above-quoted presupposes several heirs of the debtor or creditor which does not obtain in this case. Hence, the rule of indivisibility of a mortgage cannot apply

WHEREFORE, THE DECISION OF THE COURT OF APPEALS DATED FEBRUARY 11, 1977 IS HEREBY MODIFIED, AND

1. SULPICIO M. TOLENTINO IS HEREBY ORDERED TO PAY IN FAVOR OF HEREIN PETITIONERS THE SUM OF P17,000.00, PLUS P41,210.00 REPRESENTING 12% INTEREST PER ANNUM COVERING THE PERIOD FROM MAY 22, 1965 TO AUGUST 22, 1985, AND 12% INTEREST ON THE TOTAL AMOUNT COUNTED FROM AUGUST 22, 1985 UNTIL PAID;

2. IN CASE SULPICIO M. TOLENTINO FAILS TO PAY, HIS REAL ESTATE MORTGAGE COVERING 21.25 HECTARES SHALL BE FORECLOSED TO SATISFY HIS TOTAL INDEBTEDNESS; AND

3. THE REAL ESTATE MORTGAGE COVERING 78.75 HECTARES IS HEREBY DECLARED UNENFORCEABLE AND IS HEREBY ORDERED RELEASED IN FAVOR OF SULPICIO M. TOLENTINO.

NO COSTS. SO ORDERED.

Concepcion, Jr., Escolin, Cuevas and Alampay, JJ., concur.

Aquino (Chairman) and Abad Santos, JJ., took no part.